Supreme Court, U.S.
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NO. _____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

SCHOOL CITY OF MISHAWAKA,
Petitioner
v.

FAMILY AND CHILDRENS CENTER, INC.,
Respondent

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

1. Whether 20 U.S.C. §1415, which provides for the administrative and judicial review of placement decisions under the Individuals with Disabilities Education Act ("IDEA")(20 U.S.C. §1400 et seq.) grants standing (either directly or third-party) to individuals, organizations or entities other than "parents, guardians or surrogate parents."

2. Whether the Family and Children's Center, Inc. has exhausted its administrative remedies as is required under 20 U.S.C. §1415(e) and (f) by filing and pursuing an administrative complaint ("EDGAR") investigation rather than an impartial due process hearing and appeal.

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SCHOOL CITY OF MISHAWAKA,
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FAMILY AND CHILDRENS CENTER, INC.,
Respondent

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

The School City of Mishawaka respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., 1a-16a) is reported at 13 F.3d 1052. The opinion of the district court (App., 17a-35a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 5, 1994 (App., 1a) and denied the Petition for Rehearing with Suggestion for Rehearing In Banc by Amended Order dated March 17, 1994. (App., 60a)

STATUTORY PROVISION INVOLVED

This case turns on the contrast between the impartial due process hearing procedures available to "parents, guardians and surrogate parents" under Section 1415(b) of the Individuals with Disabilities Education Act ("IDEA")(20 U.S.C. §1400 et seq.)[1], the federal implementing regulation, 34 CFR §300.506, and the Indiana implementing regulation, 511 IAC 7-15-5 and the complaint procedures available to any "organization or individual" under the Education Division General Administration Regulations ("EDGAR") enacted under the authority of 20 U.S.C. §1232c, the federal implementing regulation, 34 CFR §§76.780-83[2], and the Indiana implementing regulation, 511 IAC 7-15-4. The full text of these statutes is set out in the appendix.

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[1] Formerly the Education of the Handicapped Act ("EHA") and the Education for all Handicapped Children Act ("EAHCA").

[2] As noted in OSEP Letter 94-16 (App., 88a-96a), on July 8, 1992, after the FCC filed its original Complaint with the district court, the EDGAR complaint procedures in 34 CFR §§76.780-83 were repealed and replaced with 34 CFR §§300.660-62. The new regulations were enacted under the authority of 20 U.S.C. §2831(a). The new regulations, as did their predecessor, provide that: "An organization or individual may file a signed written complaint under the procedures described in Secs. 300.600-300.661." The FCC invoked the EDGAR complaint procedures during the 1991 administrative process.

STATEMENT

Respondent, Family and Children's Center, Inc. ("FCC") is a state licensed, private child care facility with its main campus and offices within the boundaries of the Petitioner, School City of Mishawaka ("School City"). On May 29, 1992, FCC filed suit in district court against the School City alleging that the School City had violated the provisions of the IDEA by a variety of actions, the chief of which was not compensating the FCC for the use of its facilities for the education of certain disabled children. The district court dismissed the suit finding that the FCC lacked standing under the IDEA. The court of appeals reversed.

A. The Relationship between FCC and the School City.

FCC has approximately 110 children classified as emotionally handicapped, most placed with FCC as a result of court order. (Amended Complaint, para. 5) However, legal custody of these children remains with the placing agencies and/or the parents under Indiana law. Apart from its main campus in Mishawaka, FCC owns and operates two group homes in South Bend where a total of 17 children are housed at any one time. (Id., para. 6)

Prior to 1979 children at FCC received educational services from the School City at its expense. In 1979 as the result of a number of assaults on students and staff and consequent expulsions, FCC removed the children from the School City and began its own school, educating the children at its own expense.[3] FCC initially recouped these expenses

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[3] Prior to early 1970 FCC was an orphanage and shelter for runaway children. In the late 1970's FCC began changing the nature of its residential program to a residential treatment facility for severely emotionally disabled children. Children are placed are at FCC when they cannot be placed locally because of violent conduct or the severity of emotional impairment. Many of the children are sexual offenders or have been the victim of sexual abuse. Approximately one-half of the children are placed in preferred adolescent care units ("PAC") which are staff secure closed wards. These children are incarcerated.

through its per diem charges, however, because of the expanding cost of the program, in 1982 FCC requested School City assistance. The School City assisted FCC by entering into an Instructional Services Agreement with FCC whereby FCC would continue to provide its own teachers and facilities for the program, and the School City would collect transfer tuition for these children and give these funds directly to FCC.

Over the next eight years, the cost of providing an educational program substantially outgrew the revenues generated through the transfer tuition subsidy. These overruns were again charged by FCC back to the agencies as a part of its per diem. In 1990, the FCC determined that it could substantially increase its revenues if it shifted the entire expense of the educational program to the School City, and "decided (unilaterally determined) that School City of Mishawaka should educate all of the children at the Family & Children's Center." (Complaint Investigator's Order of 12/9/91; App., 40a-41a, para. 9)

In response to this demand, the School City agreed to be responsible for providing educational services to the children located at the main campus and in the Mishawaka group home, but declined to be responsible for educating children located in the South Bend group homes, as the School City felt that these students were the responsibility of the South Bend Community Schools, where the students were housed. (Id., 40a, para. 6) The School City also refused FCC's demands that the School City construct or lease a facility on FCC's grounds where the education would take place. (Amended Complaint, para. 23-25)

As the children move through a continuum of treatment, they progressively receive more freedom. This process culminates in placement at one of three group homes. The average stay for a child at FCC is one year. The average cost per child for PAC unit care runs between $70,000.00 and $100,000.00 per year. (See generally Complaint Investigator's Order of 12/9/91; App., 36a-50a)

B. Proceedings Below

On September 17, 1991, FCC filed a complaint with the Indiana Department of Education ("IDOE") seeking an order finding that the School City had violated the IDEA and requiring the School City to educate those children periodically housed in the South Bend group homes, to provide a summer instructional program for the children, to reimburse FCC for the expenses it incurred in educating the children and to require School City to either provide its own facilities to educate the children or to reimburse FCC for the School City's use of FCC's facilities in educating the children. (Complaint Investigator's Order of 12/9/91, App., 37a) The IDOE accepted the complaint under Indiana's EDGAR complaint procedure, 511 IAC 7-15-4, which provides in pertinent part that "(a) Any individual, group of individuals, agency, or organization may file a complaint alleging violations of federal or state laws that apply to special education programs ... ."

The IDOE determined on its own initiative to address FCC's complaint in a two-part manner. The first step was to complete its EDGAR complaint investigation process, and then any remaining issues were to be addressed by way of a hearing before an IDOE hearing officer. (Id., 36a-37a; Hearing Officer's Order of 5/15/92, 57a-58a, para. 2-5) On December 9, 1991, the EDGAR complaint investigator entered Findings of Fact, Conclusions of Law and Order finding against FCC and in favor of the School City. (Complaint Investigator's Order of 12/9/91, App., 36a-50a) FCC requested that the IDOE reconsider this determination, and on January 14, 1992 the IDOE denied FCC's request. (IDOE Appeals Order of 1/14/92, 51-54a) Pursuant to the provisions of EDGAR and 511 IAC 7-15-4(j), on January 27, 1992 FCC appealed the IDOE decision to the Secretary of the United States Department of Education ("USDOE").[4] On

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[4] "A State shall include the following in its complaint procedure: ... (c) The right to request the Secretary to review the final decision of the State." 34 CFR 76.781(c). This provision is specifically noted in the USDOE response of July 22, 1992 and shows clearly that FCC was exhausting EDGAR complaint procedures, not the §1415 impartial

July 22, 1992, the USDOE upheld the IDOE's determination. (USDOE Letter of 7/22/92, App., 55a-56a)

Following its denial of FCC's appeal of the EDGAR findings the IDOE sent the remaining issues to a due process hearing officer. On April 20, 1992, the School City moved to dismiss the due process hearing as the Hearing Officer was without jurisdiction because FCC lacked standing. On May 15, 1992, the Hearing Officer dismissed the remaining claims based upon a lack of jurisdiction. (Hearing Officer's Order of 5/15/92, App. 58a-59a, Order A)

On May 29, 1992, FCC filed its Complaint alleging that the School City violated the IDEA and Indiana common law in the manner in which it dealt with FCC. FCC later amended its complaint dismissing the pendant state law claims and refiling these claims in state court.[5]

The sole jurisdictional invocation in Plaintiff's Amended Complaint is: "2. This Court has jurisdiction pursuant to 28 U.S.C. §1331 as this matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. §1415(e)." (Amended Complaint, p. 17, para. 2) The district court dismissed FCC's Amended Complaint finding that it lacked both direct and third-party standing under §1415. The Seventh Circuit reversed this decision. In rendering its decision, the Seventh Circuit noted that "this case presents the narrow issue of whether Family & Children's Center, Inc. ("FCC") ... should be accorded third-party standing to advocate the rights of children with disabilities" under the IDEA. (App., 1a). In rendering this decision the Seventh Circuit erroneously assumed that the

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due process procedures as there is no provision for secretarial review in §1415 or its implementing regulations.

[5] These claims are currently pending in the St. Joseph Circuit Court, Family and Children's Center v. School City of Mishawaka, et al., Cause No. 71C01-9302-CP-10094. The parties are in the process of settling the pending state law claims raised in that litigation.

EDGAR complaint procedure (511 IAC 7-15-4) was the same as the due process hearing procedure required under §1415(b):

> "By enacting 511 IAC 7-15-4, which permits 'any individual, group of individuals, agency, or organization' to file a complaint alleging the violation of federal laws that apply to special education, like the IDEA, the Indiana legislature has complied fully with the dictates of sec. 1415(b). In other words, the Indiana legislature has invited FCC to initiate the state administrative process required by sec. 1415(b) as a condition of federal assistance for the education of Indiana's children with disabilities. And the IDEA clearly authorized Indiana to do so. The record shows that FCC exhausted its state remedies as an aggrieved party is required to do by subsection (b) before filing suit. Thus, FCC was entitled to proceed under paragraph (2) of sec. 1415(e)."

(Id., 13a-14a). The Seventh Circuit thus held that Indiana, by enacting its EDGAR complaint procedure, accorded FCC standing under §1415(b) and (e).

REASONS FOR GRANTING THE PETITION

In rendering its decision the court of appeals simply ignored the clear distinction between EDGAR complaint procedures (511 IAC 7-15-4 is a response to a Congressional mandate made under 20 U.S.C. §1232c and its implementing regulations, 34 CFR §76.780-83), and the due process hearing proceedings mandated and implemented under the IDEA (511 IAC 7-15-5 is a response to a Congressional mandate made under 20 U.S.C. §1415(b) and its implementing regulation, 34 CFR 300.506). In finding that FCC had standing to invoke the impartial due process hearing procedure under the IDEA, in addition to ignoring the express language of the statutes and regulations, the court of appeals also overlooked clear Congressional intent, the findings of the First, Second, Ninth and Tenth circuits, as well as several district and state courts and the express position

of the USDOE. The decision is erroneous, and the issues that it addresses are important.

I. The Court of Appeals interpretation of 20 U.S.C. §1415(b) conflicts with the holdings of the First, Second, Ninth and Tenth circuits.

The Seventh Circuit's decision extends third-party standing under the procedural due process provisions of the IDEA to a private organization which acknowledges that it is neither "parent, guardian, or surrogate parent" to the disabled children or a public agency.[6] The decision to extend third-party standing to initiate due process hearing procedures under the IDEA by individuals or organizations other than parents, guardians, surrogate parents, or a public agency is in conflict with decisions of the First, Second, Ninth and Tenth circuits, as well as numerous other courts and the position of the USDOE.

These conflicts arise in two fashions, first, the Seventh Circuit's decision is in direct conflict with those courts which have held that standing to invoke the due process hearing procedures of the IDEA are limited to "parents, guardians, and surrogate parents"[7], and second, the

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[6] "As the terms are defined by statute and regulation, FCC is neither parent, guardian, nor surrogate parent to the Handicapped Children." (FCC's Appellant's Brief, p. 22).

[7] Courts holding that standing to invoke the due process hearing procedures under §1415(b) is limited to the statutorily mandated "parents, guardians and surrogate parents" are: Andrews v. Ledbetter, 880 F.2d 1287 (11th Cir. 1989); Susan R.M. v. Northeast Independent School District, 818 F.2d 455 (5th Cir. 1987); U.S. v. Tennessee, 798 F.Supp. 483 (W.D.Tenn. 1992); Seneca Falls School District v. Liverpool School District, 728 F.Supp. 910 (W.D.N.Y. 1990); Gehman v. Prudential Property and Casualty Insurance Co., 702 F.Supp. 1192 (E.D.Pa.1989); Allstate Insurance Company v. Bethlehem Area School District, 678 F.Supp. 1132 (E.D.Pa. 1987); Andrew H. v. Ambach, 600 F.Supp. 1271 (N.D.N.Y. 1984); Juneau Academy v Chicago Board of Education, 461

manner in which the Seventh Circuit reached its decision, i.e. equating an EDGAR complaint procedure with a §1415 due process hearing procedure, is in direct conflict with the decisions of the First, Second, Ninth and Tenth circuits, as well as several district and state courts and the position of the United States Department of Education.[8]

The Court should grant certiorari to review these important conflicts.

II. The Decision of the Court of Appeals is Erroneous.

A. The Seventh Circuit improperly determined that Indiana's EDGAR complaint procedure is identical to its §1415(b) due process hearing procedure.

As noted previously, jurisdiction has been invoked by FCC solely under §1415(e) and FCC's standing must be examined under that provision alone. Primate Protection League v. Tulane, 500 U.S. 74 (1991).

N.E.2d 597 (Ill.App. 1984); Nelson v Tuscadora Intermediate Unit No. 11, 500 Pa. 458, 457 A.2d 1260 (1983) cert. denied, 464 U.S. 866 (1983). But see Arons v. New Jersey State Board of Education, 1987 WL 10808 (D.N.J. 1987) aff'd on other grounds 842 F.2d 58 (3rd Cir. 1988), cert. denied, 488 U.S. 942 (1988).

[8] The following courts have held that the EDGAR complaint procedure is separate and distinct from the due process hearing procedure in §1415(b): Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1091 n. 2 (1st Cir. 1989); Mrs. W. v. Tirozzi, 832 F.2d 748, 751 (2nd Cir. 1987); Hoeft v. Tucson Unified School District, 967 F.2d 1298, 1300 (9th Cir. 1992); Association for Community Living in Colorado et al. v. Romer, 992 F.2d 1040, 1045 (10th Cir. 1993); Learning Disabilities Association of Maryland v. Baltimore County, 837 F.Supp. 717, 722, n. 11 (D.Md. 1993); Stauffer v. Wm. Penn School Dist., 829 F.Supp. 742, 743-744 n. 4 (E.D.Pa. 1993); Richards v. Fairfax County School Board, 798 F.Supp. 338, 342 (E.D.Va. 1992); Mrs. W. v. Tirozzi, 706 F.Supp. 164, 168 (D.Conn. 1989); Wilson v. School District No. 1, Multnomah County, 69 Or.App. 63, 686 P.2d 385, 388 (1983). The USDOE has also expressly stated that these are two separate procedures, both before (Letter to Johnson, 18 IDELR 589, 590-591 (OSERS, 1991)(App., 84a-85a) and after this decision. (OSEP Letter 94-16 (App., 91a)

The Seventh Circuit determined that because FCC was granted the right, under Indiana law, to initiate EDGAR complaint proceedings as "an organization or individual" it also had the right to initiate §1415 due process hearing procedures including having standing to file this suit under §1415(e)(2). The Seventh Circuit is in error in its basic assumption that the EDGAR complaint process provided for in 511 IAC 7-15-4 is the same as the due process hearing procedure referred to in §1415(b), it is not.

The flaw in the Seventh Circuit's opinion is the assumption that 511 IAC 7-15-4 was designed in response to the procedural requirements of §1415(b) it was not. In reality, as noted above, 511 IAC 7-15-4 is a response to the EDGAR requirements and has nothing to do with the due process hearing procedures under §1415(b). The Seventh Circuit, as did the district court, unfortunately confused Indiana's EDGAR complaint procedure (511 IAC 7-15-4) with the §1415(b) due process hearing procedures found at 511 IAC 7-15-5.[9]

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[9] The confusion of the Seventh Circuit is somewhat understandable because of the proximity of the EDGAR complaint procedure and the §1415(b) due process hearing procedure in the Indiana Administrative Code. This is further compounded by the fact that the word complaint is used both in EDGAR and in §1415(b). However, the two are clearly distinguishable. For example EDGAR complaints under 511 IAC 7-15-4 may be filed by "an individual, group of individuals, agency, or organization", about any issue "alleging violations of [any] federal or state laws that apply to special education." In addition, the State Educational Agency ("SEA") directly investigates these complaints by appointing a complaint investigator who is an employee of the SEA, there are no due process rights or a hearing in the complaint investigation, and the only appeal is to the USDOE. The remedy against a school that is found in violation of 511 IAC 7-15-4 is the withholding of federal funds. In contrast under 511 IAC 7-15-5 only a "parent, a public agency, or the state education agency may initiate a due process hearing", and may do so only about issues surrounding "the provision of a free and appropriate public education for the student." The SEA appoints an independent hearing officer who may not be an employee of the SEA, there are complete due process rights and a hearing, and there is a multi-tier appeals process (511 IAC 7-15-6) whereby the hearing officer's decision may be appealed to the Board of Special Education Appeals and then suit may be filed in court. The remedy for a violation of 511 IAC 7-15-5 is injunctive relief directing the school to provide the child with a FAPE, compensatory damages, and attorneys fees. Additional evidence that 511

The difference between EDGAR complaint procedures and §1415(b) due process hearing procedures has been described as follows:

> "The EDGAR procedures are different in both purpose and scope from those in the IDEA and do not provide parents who file complaints with the same opportunities for a full administrative hearing and judicial review. See Richards v. Fairfax County Sch. Bd., 798 F.Supp. 338, 342 (E.D.Va. 1992). Unlike EDGAR, the IDEA was carefully tailored to ensure that complainants receive the benefits of a full administrative hearing prior to seeking judicial review and that the reviewing court has the benefit of an administrative record."

Association for Community Living in Colorado et al. v. Romer, 992 F.2d 1040, 1045 (10th Cir. 1993).[10]

IAC 7-15-4 was not enacted under §1415(b) is the fact that the procedures outlined do not meet the minimal procedural requirements of §1415(b). There is also no right of appeal to the USDOE in the §1415(b) procedures (511 IAC 7-15-5 and 6) as is required under EDGAR. Further distinctions, including a detailed legislative history, will be provided in the Amicus Brief being filed by the State of Indiana.

[10] "In addition to the IDEA's procedural safeguards for ensuring parental involvement in the educational decisionmaking process, federal regulations provide an administrative mechanism for ensuring state compliance with federally funded education programs, including the IDEA. The Education Division General Administration Regulations (EDGAR) require states to adopt a formal procedure for receiving and resolving complaints that the state or local education agency is violating the IDEA or its regulations. The state EDGAR complaint procedure is to include a time limit of 60 days for the state to investigate and resolve complaints, to be extended only under 'exceptional circumstances.' A complainant dissatisfied with the state's disposition of an EDGAR complaint may request review of the state's decision by the U.S. Secretary of Education." Hoeft v. Tucson Unified School District, 967 F.2d 1298, 1300 (9th Cir. 1992)(citations omitted); "Under the General Provisions Concerning Education, 20 U.S.C. §1221, et seq., Congress authorized the Secretary of Education to require the state to submit a plan for monitoring compliance by local agencies with various federal educational requirements. 20 U.S.C. §1232c(a). The Secretary may require such plan to provide ... and (3) that the state investigate and resolve all complaints received by the state relating to the administration of such

Every court which has addressed this issue, with the exception of the Seventh Circuit, has acknowledged that the EDGAR complaint procedure is separate and independent from the IDEA. Because the two are unrelated, standing to invoke EDGAR procedures is simply irrelevant to standing to invoke the due process hearing procedures under §1415(b) and (e). See Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1091 n. 2 (1st Cir. 1989)("EDGAR provides an administrative mechanism for assuring that a state complies with state-administered federal programs, including the [IDEA]. EDGAR is to be distinguished from the specific administrative complaint procedures detailed in the [IDEA] itself."); Mrs. W. v. Tirozzi, 832 F.2d 748, 751 (2nd Cir. 1987); Hoeft v. Tucson Unified School District, 967 F.2d 1298, 1300 (9th Cir. 1992); Association for Community Living, supra., 992 F.2d at 1043; Learning Disabilities Association of Maryland v. Baltimore County, 837 F.Supp. 717, 722, n. 11 (D.Md. 1993); Richards v. Fairfax County School Board, 798 F.Supp. 338, 342 (E.D.Va. 1992); Mrs. W. v. Tirozzi, 706 F.Supp. 164, 168 (D.Conn. 1989); Wilson v. School District No. 1, Multnomah County, 69 Or.App. 63, 686 P.2d 385, 388 (1983). Furthermore, OSERS[11] in Letter to Johnson, 18 IDELR 589, 590-591 (OSERS, 1991)(App., 84a-85a)(parenthetical supplied) stated as follows:

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programs. Id. ... Thus authorized, the Secretary adopted 34 C.F.R. §§ 76.780-76.783 and thereby required states to provide a Complaint Review Procedure." Mrs. W. v. Tirozzi, 706 F.Supp. 164, 168 (D.Conn. 1989). The sole purpose of EDGAR is to ensure, through an administrative oversight process, that all types of federal education funds under a variety of programs are being used properly by states, not just funds received under the IDEA. There is no provision for judicial review in EDGAR, "[a] complainant dissatisfied with the state's disposition may request review of the state decision by the U.S. Secretary of Education, 34 CFR §76.781(C), who is authorized to withhold federal funding from a state found to be in noncompliance with the IDEA." Learning Disabilities Association of Maryland v. The Board of Education of Baltimore County, 837 F.Supp. 717, 722 n. 10 (D.Md. 1993).

[11] The Office of Special Education and Rehabilitative Services of the United States Department of Education ("OSERS"). The Office of Special Education Programs ("OSEP") is a Congressionally created agency charged as "the principal agency in the Department [of Education] for administering and carrying out this chapter ... ." (20 U.S.C. §1402(a))

> "The due process [§1415(b)] and [EDGAR] complaint procedures are two separate, distinct, or independent remedies available to students with disabilities and their parents, to resolve issues of disagreement between parents and local school districts."

See also Letter to Robb, 17 EHLR 468, 469 (OSERS, 1990)(App., 98a-99a).

The distinction between EDGAR procedures and the due process hearing procedure under §1415(b) and the problems inherent in mixing the two is best illustrated in Association for Community Living, supra. This case involved a class action brought by certain organizations, four disabled children and their parents (collectively "ACL") against the Colorado Department of Education ("CDE") alleging that the children were deprived of certain rights guaranteed under the IDEA. The procedural posture of the case was as follows:

> "The plaintiffs did not pursue the administrative remedies available under the IDEA, but did file a complaint with CDE pursuant to Colorado's EDGAR complaint procedure. Dissatisfied with the resolution of their EDGAR complaints, ACL brought this civil action pursuant to 20 U.S.C. §1415(e)(2). CDE moved to dismiss for failure to exhaust administrative remedies under the IDEA. The district court denied the motion and granted partial summary judgment for ACL. After ordering revision of CDE's extended school year guidelines, the district court granted CDE's motion for summary judgment and ACL appealed."

Id., 992 F.2d at 1043 (emphasis supplied).

The issue before the Tenth Circuit was whether the ACL had exhausted their administrative remedies as required in §1415(e)(2) when they had failed to utilize the due process hearing procedures under §1415(b)(2) and had only exhausted the EDGAR complaint procedures. This is identical to what FCC has done in the present case. The court

found that the ACL failed to exhaust their administrative remedies under §1415(e) and directed the dismissal of the case for lack of jurisdiction.

> "Judicial review under 20 U.S.C. §1415(e)(2) is normally not available until a plaintiff has exhausted the administrative remedies provided under §§ 1415 (b)(2) and (c).
>
> * * *
>
> We also conclude that the complaint ACL filed pursuant to Colorado's EDGAR procedures is not an adequate alternative to exhausting administrative remedies under the IDEA. Although the EDGAR complaint did notify CDE of the alleged violations and afford it an opportunity to correct the alleged error, it did not further any of the other purposes of the exhaustion requirement. The EDGAR procedures are different in both purpose and scope from those in the IDEA and do not provide parents who file complaints with the same opportunities for a full administrative hearing and judicial review. Unlike EDGAR, the IDEA was carefully tailored to ensure that complainants receive the benefits of a full administrative hearing prior to seeking judicial review and that the reviewing court has the benefit of an administrative record. Id. Allowing plaintiffs to file EDGAR complaints in lieu of exhausting administrative remedies under the IDEA would undermine these goals."

Id., 992 F.2d at 1043-1045 (citations omitted).

The Tenth Circuit opinion makes two points relevant to this case. First, that the EDGAR complaint procedure is entirely separate from the due process hearing procedure under §1415(b), directly contradicting the Seventh Circuit's findings, and second that the exhaustion requirement of §1415(e) can only be met by the exhaustion of the §1415(b) due process hearing procedures, not the EDGAR complaint procedures.

The present case is no different.[12] As the Seventh Circuit correctly notes, FCC has exhausted the EDGAR complaint procedure, 511 IAC 7-15-4, but has not (and under the applicable statutes and regulations could not have) exhausted the due process hearing procedures under §1415 (b), 511 IAC 7-15-5. Thus FCC is not (and could not be) a "party aggrieved by the findings and decisions made under subsection (b)" and therefore there is no "right to bring a civil action with respect to the complaint" under §1415(e)(2).

The scope of Indiana's EDGAR procedure is simply irrelevant to the question of whether FCC has standing under §1415. The proper inquiry is whether Indiana's §1415(b) due process hearing procedure (511 IAC 7-15-5) grants standing to FCC as part of "a broad group of plaintiffs", and the answer is that it does not. 511 IAC 7-15-5, like §1415(b)[13] and 34 CFR 300.506[14], expressly limits standing under §1415(b) to parents (guardians and surrogate parents) and public educational agencies. Thus the rationale for invoking the usual prudential restraints on judicial review remain, and all of these clearly support denying FCC third-party standing under §1415. Because FCC has no right to bring a civil action under §1415(e)(2), the only section cited by them in invoking the jurisdiction of the district court, the district court correctly

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[12] The only important difference between the two cases is that in Association for Community Living parents and children with disabilities were actual class members, thus not implicating the standing issues raised in this case. The exhaustion issue is the same.

[13] §1415(b)(2) specifically limits the individuals who can convene a due process hearing. Only "the parent or guardian shall have an opportunity for an impartial due process hearing ... ." While the states are free to adopt a more broad procedure Indiana has not done so.

[14] As noted previously, the USDOE, consistent with its mandate under the IDEA (20 U.S.C. §1413), has promulgated specific regulations limiting who may convene a due process hearing: "A parent or a public educational agency may initiate a hearing ... ." 34 CFR 300.506. Any state regulation that would broaden this class would run afoul of this regulation and the state would be denied federal funding as a consequence.

determined that it lacked jurisdiction over this matter and the Seventh Circuit is in error.

B. The Seventh Circuit erroneously found that the FCC had exhausted its administrative remedies.

The Seventh Circuit correctly acknowledged that exhaustion of administrative remedies is a prerequisite for suit under the IDEA, however, it erred when it found that the exhaustion of EDGAR complaint procedures was the same as exhausting the due process hearing procedures under §1415(b). See Association for Community Living, supra.; Richards v. Fairfax County School Board, 798 F.Supp. 338, 342 (E.D.Va. 1992)("If the plaintiffs are deemed to have exhausted their remedies under the statute [§1415(e)] simply by resorting to the EDGAR procedures, the appeals process set forth in the [IDEA] will be entirely frustrated.")

III. The Questions Presented are Important.

The questions presented in this case are important for three reasons. First, the Seventh Circuit's decision is not limited to Indiana, but is applicable to every state in the Union as they have (and are required by law to have) identical EDGAR complaint and due process hearing procedures. Second, the Seventh Circuit's decision clearly contradicts the intent of Congress in enacting the IDEA by allowing the intercession of third parties into educational decisions which both Congress and this Court have acknowledged are best made by parents and educators alone. Finally, the importance of these issues and the substantial confusion generated by this decision warrant clarification by this Court.

A. Impact beyond Indiana.

Every state has regulations substantially identical to those of Indiana. This is, as this Court has noted, because the IDEA "conditions

federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." Honig v. Doe, 484 U.S. 305, 310 (1988). This includes implementing both EDGAR complaint procedures by providing for regulations allowing "[a]n organization or individual" to file a complaint (34 C.F.R. 300.662) and §1415 due process hearing procedures which are open to "a parent or public agency." (34 C.F.R, 300.506) Contained within the Appendix to this pleading is a state by state comparison containing the pertinent individual state regulations. (App., 117a-142a) As can be seen from this analysis, every state has provisions substantially identical to those of Indiana, and consequently every state would similarly be affected by the Seventh Circuit's decision finding that by adopting broadly accessible EDGAR complaint procedures as mandated by USDOE they have implicitly opened their due process hearing procedure to any organization or individual.

B. The Seventh Circuit's decision will have profound and dramatic consequences on the education of disabled children throughout the nation.

In 1975, Congress began work on the comprehensive act which was the framework for the current IDEA (P.L. 94-142). P.L. 94-142 made a great deal of changes to the Education for the Handicapped Act, including renaming it the Education for all Handicapped Children Act of 1975. With respect to due process provisions (§1415 requirements), both the House and the Senate versions of the bill essentially reenacted the procedures contained in the EHA. (S. Conf. Rep. No. 94-455, p. 47-48; 2 U.S. Cong. & Admin.News '75, p. 1500-1501) In so doing both bodies maintained the requirements that an individual be either a parent, guardian, or surrogate parent in order to have standing under the statute. (Id.)

However, in addition the Senate bill (S. 6) contained a provision for allowing due process hearings under §1415 for complaints made by individuals other than parents, guardians or surrogate parents:

"The Committee bill provides that as a condition of eligibility there be established in the State an entity for insuring compliance with the provisions of the Act. Under the provisions of the Committee bill, such entity shall (1) conduct public evaluations in all areas of the State to determine whether the State educational agency and local educational agencies are in full compliance, (2) **be empowered to receive complaints with respect to alleged violations of the requirements of the Act and provide notice and an opportunity for hearings with respect to such complaints**, (3) make determinations with respect to alleged violations, and, upon finding that a violation has occurred, notify the State educational agency and the appropriate local educational agency of such finding, and (4) take appropriate steps to assure that such violations are corrected."

(S. Rep. No. 94-168, p. 27; 2 U.S. Cong. & Admin.News '75, p. 1450)(emphasis supplied).

Reservations were expressed on the floors of both legislative bodies, perhaps best exemplified by Senator Dole's comments regarding the burden such universal due process procedures would have on the state educational agency:

"As we were indicating, based on the number of handicapped children stated in this bill, if only 1 percent of the parents or guardians of handicapped children should make complaints, that would be somewhere in excess of 80,000 complaints presented to compliance entities across the country. Such a volume of complaints, although only a small portion of what might be possible would clearly be a severe administrative burden on a compliance entity, the members of which may or may not be qualified to handle. **Further, since the provision states that "complaints from individuals" must be received, this would allow any individual, not simply a parent or guardian, to complain to the entity.**"

121 Cong.Rec. 19499 (1975)(remarks of Sen. Dole). As a consequence of these types of concerns, this provision which would have provided the right to initiate due process proceedings and have hearings under §1415 to individuals other than parents, guardians and surrogate parents was stripped from the final bill. See Smith v. Robinson, 468 U.S. 992, 1012, n. 16 (1984) (Noting the deletion of this mechanism from the final legislation.)

Every Congressional enactment since that date dealing with the IDEA, as well as every court decision, has reemphasized the intent to limit educational decision and due process rights under §1415(b) and (e) to parents and educators alone.[15] However, the Seventh Circuit's decision has the contrary result, rather than maximizing parental involvement in the education of each child, the decision actually dramatically reduces parental involvement by allowing "an individual, group of individuals, agency, or organization" to interfere in the placement decisions reached by the parents and the School.

The impact of this ruling is to grant a variety of third-parties the right to intercede into educational placement decisions reached by parents and educators who Congress clearly intended not to be involved. For example, consider a mildly mentally handicapped individual with AIDS who is currently being served in a self-contained classroom. Both school and parents agree that he/she would benefit from being mainstreamed with peers, however, a group of citizens feels that such a placement would be dangerous to other children. Prior to the Seventh Circuit's decision the parent's placement decision would go into immediate effect despite these objections. However, under the Seventh Circuit's decision the citizens' group would now have standing to file for a due process proceeding challenging the proposed change in placement. As a consequence of the "stay-put" provisions of the IDEA (34 CFR §300.513), the child could

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[15] In Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982), the seminal case under the IDEA, this Court noted that the IDEA's procedures reflected "Congress' effort to maximize parental involvement in the education of each handicapped child." Id., 458 U.S. at 182 n. 6.

remain in the more restrictive placement until due process proceedings are completed. Similar problems could arise with respect to non-custodial parents relitigating custody disputes under the guise of educational placement decisions (Susan R.M. v. Northeast Independent School District, 818 F.2d 455 (5th Cir. 1987)) and insurance companies challenging placements on the basis that they might be liable for some portion of the costs. Allstate Insurance Company v. Bethlehem Area School District, 678 F.Supp. 1132 (E.D.Pa. 1987); Gehman v. Prudential Property and Casualty Insurance Co., 702 F.Supp. 1192 (E.D.Pa. 1989). Such suits would frustrate the entire purpose of the IDEA.

This decision also opens the courtroom doors to hundreds of private schools who provide services to handicapped children to initiate administrative proceedings and sue public schools under the IDEA for support in providing educational services and facilities under the IDEA to their children. Thus in Zobrest v. Catalina Foothills School District, -- U.S. --, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) under the Seventh Circuit's decision the Roman Catholic High School could have sued the Catalina Foothills School District directly under the IDEA to force the School District to serve Larry Zobrest, and the elders of Kiryas Joel could have sued the state directly under the IDEA to attempt to obtain an independent school district for their children, and FCC can sue for additional financial support. This is certainly an unusual result given this Court's statement in Zobrest that: "Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian school benefit at all from the IDEA, they are only incidental beneficiaries. Thus, the function of the IDEA is hardly 'to provide desired financial support for nonpublic, sectarian institutions.'" Id., 113 S.Ct. at 2468. Yet this is precisely what the Seventh Circuit has allowed by granting any individual or organization third-party standing under the IDEA. The FCC may initiate administrative proceedings and sue the School City to obtain "desired financial support" thus making the FCC, not the children the "primary beneficiar[y] of the IDEA." This certainly does not seem to be the desired intent of this Court in Zobrest. Under the Seventh Circuit's decision every private religious school from Kiryas Joel to the Roman

Catholic High School in Arizona now has the right to file suit directly under the IDEA. If these schools alone begin to exercise the rights granted by the Seventh Circuit, a new wave of cases will arrive before this Court brought not by parents but by activists at the schools themselves. Not to mention cases filed by other organizations and advocacy groups This is in direct contradiction to Congressional intent and this Court's interpretation of the IDEA and will result in third-parties utilizing disabled children as pawns in litigation to further their own financial self interests as FCC has done in the present litigation, and it is important that this Court address this issue.

C. USDOE Clarification Letter.

The necessity for clarification from this Court can also be seen by the manner in which the USDOE has had to respond to the Seventh Circuit's decision. Prior to this decision the USDOE stated as follows: "One point I must stress, is that parents or guardians and schools are the only two parties (with the exception of surrogate parents) with the right and responsibility for initiating due process procedures." Letter of VanOsdol, EHLR 211:72, 74 (OSEP, 1978)(App., 105a).[16] However, less than two months after the Seventh Circuit's decision, on March 22, 1994, OSEP issued a seven page memorandum to the Chief State School Offices in all fifty states containing "information about (1) the relationship between the complaint resolution and due process hearing procedures in the part B regulations... ." (App., 89a) This memorandum very clearly states USDOE's position that contrary to the Seventh Circuit's finding, EDGAR complaint review procedures are open to everyone including parents but

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[16] OSEP has also specifically held that an institution identical to the FCC cannot legally represent the interests of the children as it has a direct conflict of interest with them. Letter to Kirk, EHLR, 211:243 (OSEP, 1980)(App., 107a-110a). See also Edmonds, Washington School District No. 15, EHLR 257:198, 199 (OCR, 1980) (Noncustodial parent has no standing to request a hearing under §1415(b))(App., 111a-116a).

that due process hearing procedures are only open to parents, and that these are two separate and distinct procedures.

> "C. Relationship Between the Complaint Management and Due Process Hearing Systems
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> Under the part B regulations, parents of children with disabilities have two separate means available to them for resolving disputes with public agencies concerning the education of their children -- i.e., (1) the complaint management system required in §§300.660-300.662 (which is the subject of this memorandum), and the impartial due process hearing system required in §§300.506-300.513.
>
> The State complaint procedures are available for resolving any complaint that meets the requirements of §§300.662, including (1) complaints that raise systemic issues, and (2) individual child complaints that are filed by parents."

(Id., 91a).

The fact that USDOE felt it necessary to issue a memorandum to all fifty states to clarify its position that the EDGAR complaint procedure is wholly separate from the §1415(b) due process hearing procedure just two months after the Seventh Circuit's opinion indicates both the erroneous nature of the Seventh Circuit's opinion, as well as the important potential adverse impact of this decision on disabled children and special education proceedings.

In sum, there is a clear conflict between the circuits on a matter of importance to the courts, disabled children and their advocates, school corporations, the individual states, and the federal government. This case presents a unique opportunity for this Court to address the disputed issues and ensure that "Congress' effort to maximize parental involvement in the education of each handicapped child" is implemented, rather than thwarted. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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